

No. 15464

United States
Court of Appeals
for the Ninth Circuit

*See Vol.
3020*

RICHARD E. BENNETT,

Appellant,

VS.

ARCTIC INSULATION, INC., and DELBERT
E. BOYER,

Appellees.

Transcript of Record

Appeal from the District Court for the District of Alaska,
Fourth Judicial District

FILED

APR 19 1957

PAUL P. O'BRIEN, CLERK

No. 15464

United States
Court of Appeals
for the Ninth Circuit

RICHARD E. BENNETT,

Appellant,

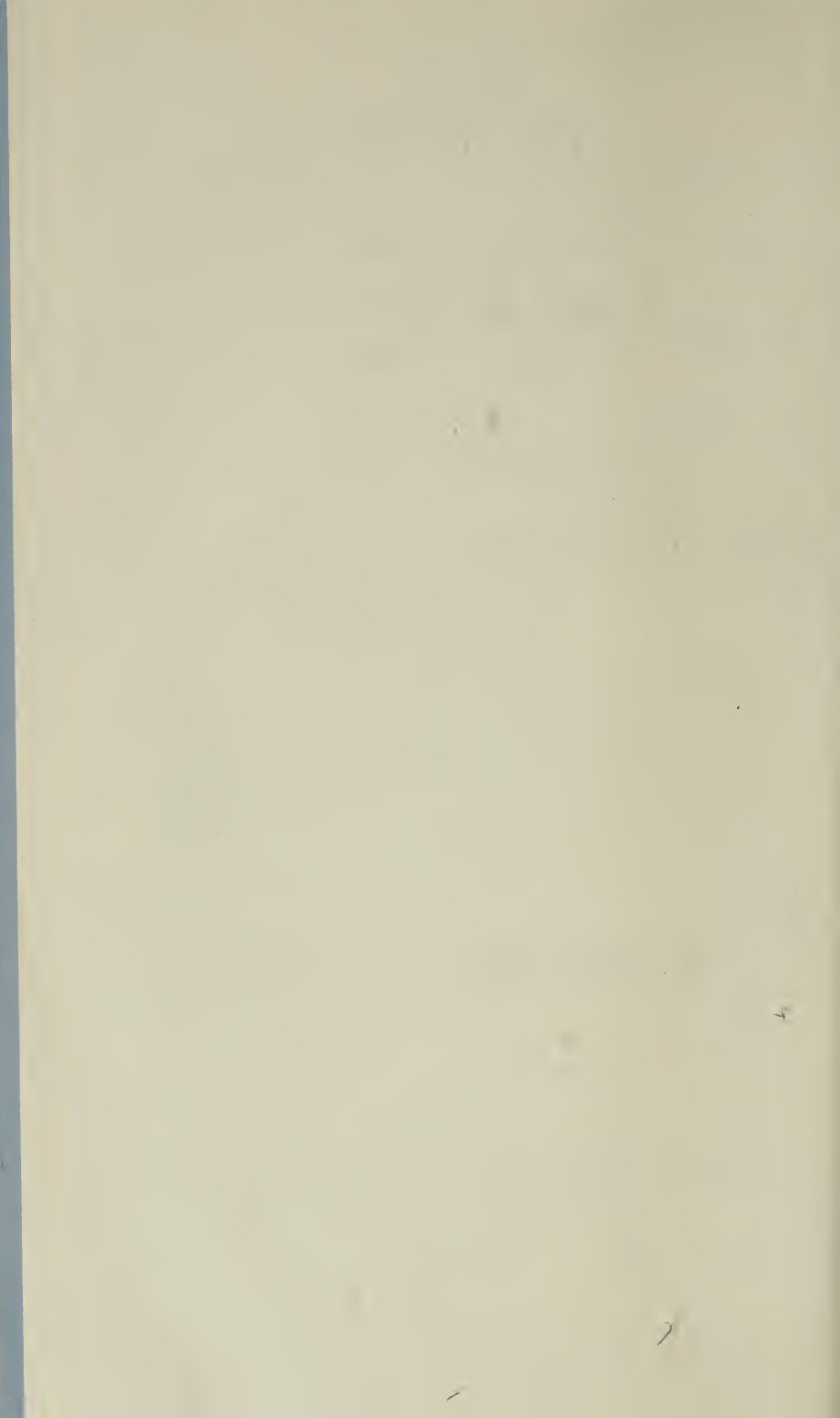
vs.

ARCTIC INSULATION, INC., and DELBERT
E. BOYER,

Appellees.

Transcript of Record

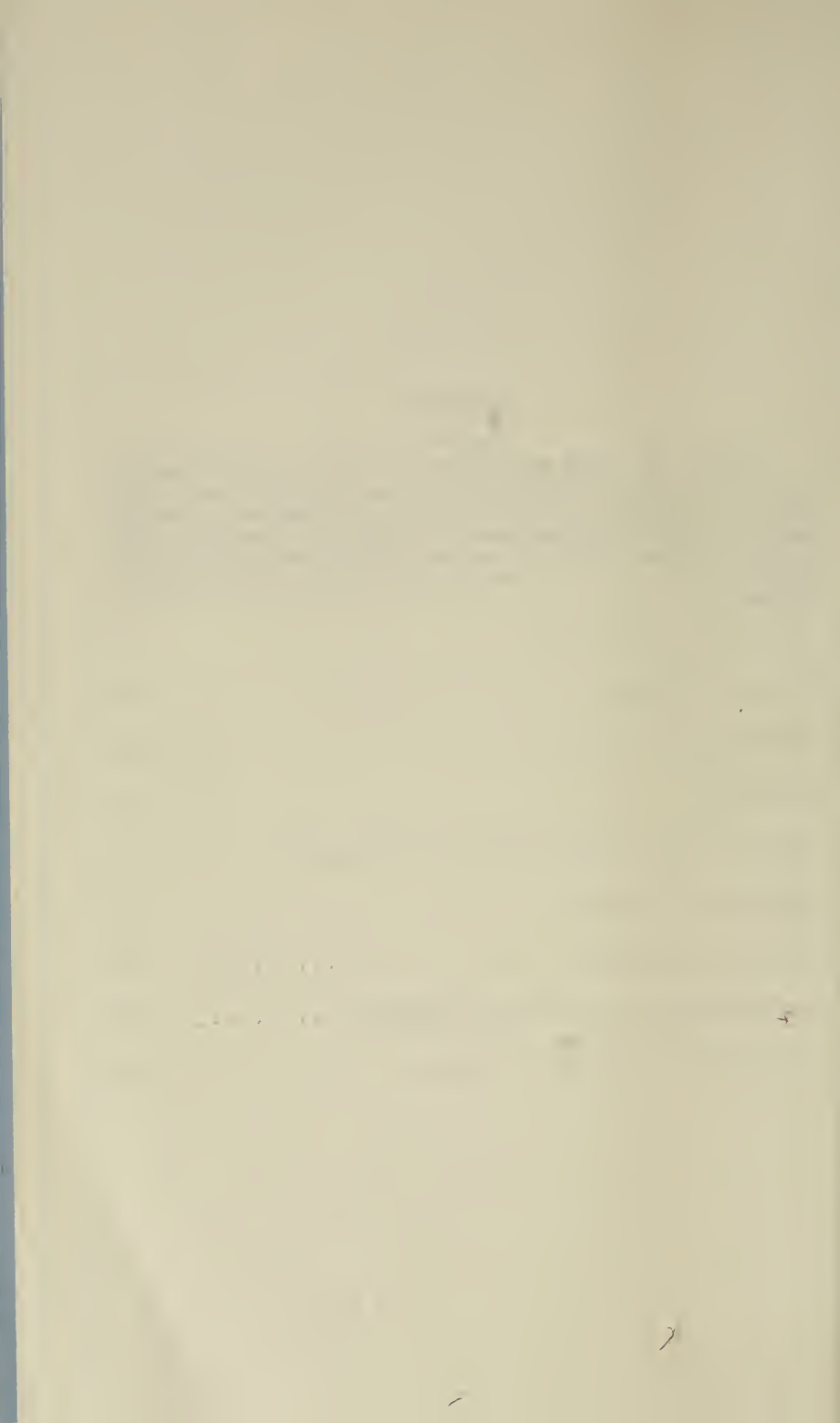
Appeal from the District Court for the District of Alaska,
Fourth Judicial District



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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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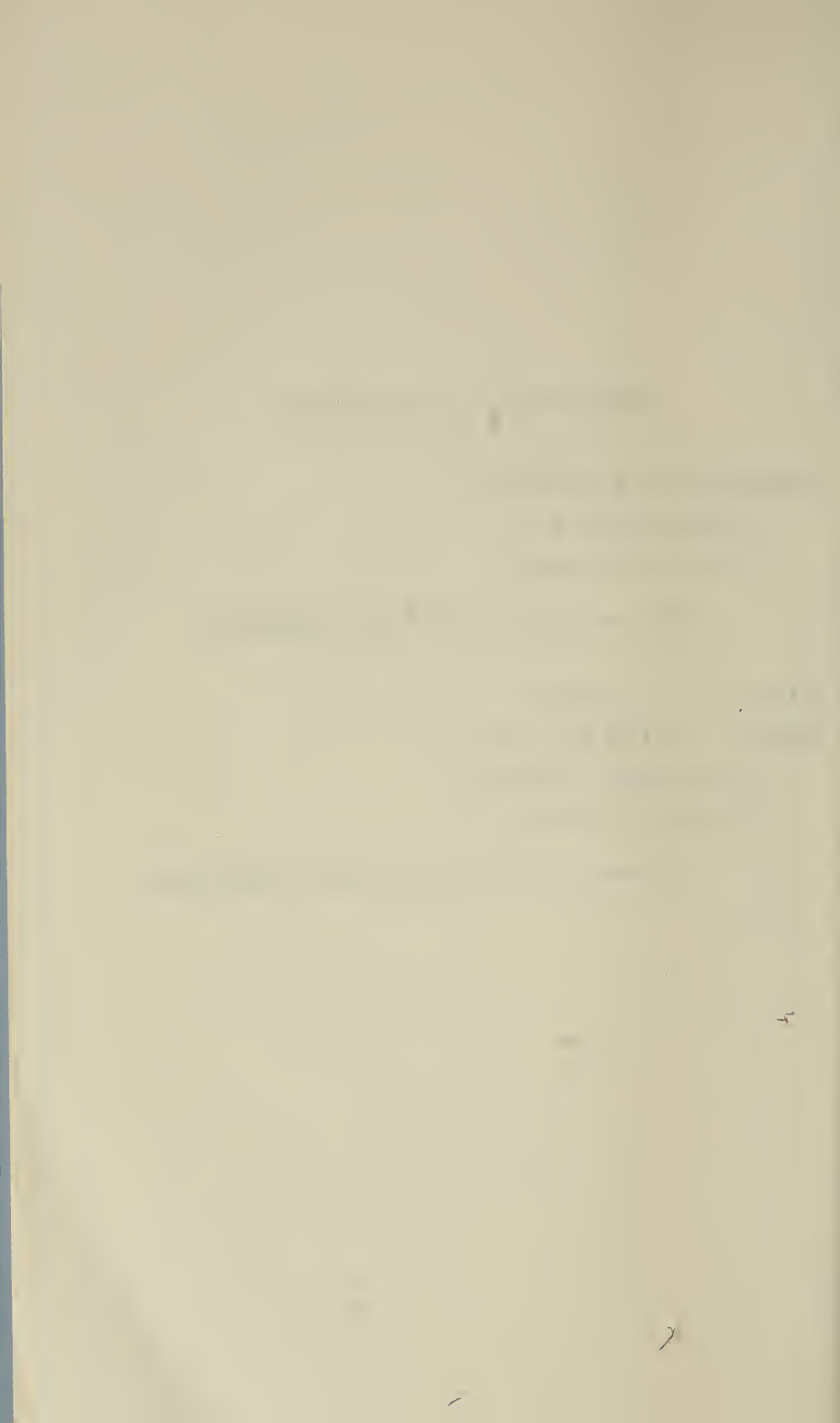
ATTORNEYS OF RECORD

ROBERT A. PARRISH,
544½ Second Ave.,
Fairbanks, Alaska,

Attorney for Plaintiff and Appellant.

CHAS. J. CLASBY,
MARY ALICE MILLER,
1000 Polaris Building,
Fairbanks, Alaska,

Attorneys for Defendants and Appellees.



In the District Court for the District
of Alaska, Fourth Division

No. 9254

RICHARD E. BENNETT,

Plaintiff,

vs.

ARCTIC INSULATION, INC., and DELBERT
E. BOYER,

Defendants.

COMPLAINT

Comes now, the above-named plaintiff, and for cause of action against the above-named defendants, complains and alleges:

I.

That on the 3rd day of October, 1954, plaintiff was operating a motor vehicle on the Richardson Highway near Fairbanks.

II.

That the defendant, Arctic Insulation, Inc., was, on the 3rd day of October, 1954, the owner of a certain 1953 Ford pickup vehicle.

That on said day the defendant, Delbert E. Boyer, agent acting within the scope of his employment, did negligently, and carelessly leave, unlocked, the said vehicle with the keys therein and unattended at Fairbanks, Alaska; that he did so in the area of several night clubs at South Fairbanks, Alaska.

That said Delbert E. Boyer, defendant, knew or should have known or should have reasonably fore-

seen that the vehicle was left in such a place where the same might be removed without consent or authority and that plaintiff might be damaged thereby.

III.

That on said day, one William F. Harris, a soldier or airman in the United States Service, did steal or assume possession of the said vehicle from the place where the same was left unattended and did carelessly and negligently drive the same on the Richardson Highway to a place about one hundred (100) feet from an intersection where a road known as the Badger Road intersects a public highway of the Territory of Alaska, known as the Richardson Highway, and did at said time and place, carelessly and negligently cause the said stolen vehicle to strike the automobile which plaintiff was driving, causing the injuries hereinafter described which were the direct and proximate result of said defendants' negligence as aforesaid.

IV.

That as a result of the premises hereinafter set out and as a direct and proximate result of the wilful, reckless, careless and negligent conduct of the defendants as aforesaid, plaintiff suffered great and severe temporary and permanent injuries of his legs, arm, back, head, face and eyes and that his system in general was completely disabled for a long period of time and will be permanently disabled and he did suffer cuts, bruises, contusions and fractures over various parts of his body and was hospitalized for a long period of time and at

intervals and did incur hospital expenses in excess of Three Thousand (\$3,000.00) Dollars, and in the future will require further hospitalization of an approximate value of Five Thousand (\$5,000.00) Dollars, or more to repair his eyes and eyesight and that he has become indebted for doctor bills of a reasonable value of Two Thousand, Five Hundred (\$2,500.00) Dollars, or more, and nursing expenses of a reasonable value of Two Thousand (\$2,000.00) Dollars; that plaintiff has been totally disabled in the past and will be partially disabled for the rest of his life; that he has lost wages and earnings and will in the future lose wages, earnings and emoluments and that as a direct result of the said negligent acts of the defendants, plaintiff is and has been damaged in the sum of Two Hundred Fifty Thousand (\$250,000.00) Dollars.

Wherefore, Plaintiff prays for judgment of and from the defendants and each of them for the sum of Two Hundred Fifty Thousand (\$250,000.00) Dollars, in addition to plaintiff's costs, disbursements, attorney's fees and fees incurred herein and accruing costs, fees and interest.

Dated at Fairbanks, Alaska, this 27th day of September, 1956.

/s/ ROBERT A. PARRISH,
Attorney for Plaintiff.

Duly Verified.

[Endorsed]: Filed September 28, 1956.

[Title of District Court and Cause.]

MOTION TO DISMISS

Comes now the defendant, Arctic Insulation, Inc., a corporation, by its attorneys, Collins, Clasby and Sczudlo, and moves that the above-entitled cause and the complaint filed therein be dismissed upon the ground and for the reason that the complaint fails to state facts sufficient to constitute a claim for relief against this defendant for the following reasons: (a) no acts of negligence of this defendant sufficient to support said cause are alleged; (b) no purported negligence of this defendant constituted the proximate cause of the personal injuries alleged to have been suffered by the plaintiff; (c) the personal injuries, if any, suffered by plaintiff were caused by the negligence of William F. Harris, who stole or assumed possession, without authority, of the vehicle described in the complaint; and (d) that the defendant Delbert E. Boyer was not acting within the scope of his employment and was not the agent of this defendant at the time of the accident alleged in the complaint, or at the time that the vehicle described in the complaint, owned by this defendant, was stolen or unauthorized possession thereof taken by William F. Harris.

Dated at Fairbanks, Alaska, this 13th day of November, 1956.

COLLINS, CLASBY AND
SCZUDLO,

By /s/ WALTER SCZUDLO,
Attorneys for Defendant,
Arctic Insulation, Inc.

Receipt of copy acknowledged.

[Endorsed]: Filed November 13, 1956.

[Title of District Court and Cause.]

ORDER GRANTING MOTION TO DISMISS

This Cause coming on regularly to be heard before the undersigned judge of the above-entitled court on December 7, 1956, upon the motion of the Defendant Arctic Insulation, Inc., to dismiss the above-entitled action, and the court having examined and considered the pleadings, the briefs of the parties in support of and in opposition to such motion, and the records and files in Cause No. 9072, Richard E. Bennett, Administrator of the Estate of Evelyn E. Bennett, deceased, vs. Arctic Insulation, Inc., et al., to which reference is made in the briefs in this cause, together with the additional authorities now submitted by plaintiff in support of the complaint; and it appearing to the court that the plaintiff has failed to state a claim upon which the relief sought can be granted, and that the sufficiency of the allegations of the complaint to constitute negligence and proximate cause are questions of law for the court and not questions of fact for a jury;

Now Therefore in accordance with the decision of the Honorable Vernon D. Forbes, judge of this court, in Cause No. 9072,

It is Ordered that the motion of the defendant is granted and that the within cause of action be and is hereby dismissed.

Dated at Fairbanks, Alaska, this 26th day of December, 1956.

/s/ WALTER H. HODGES,
District Judge.

[Endorsed]: Filed and entered December 26, 1956.

[Title of District Court and Cause.]

NOTICE OF APPEAL

Notice Is Hereby Given that Richard E. Bennett, Plaintiff above named, hereby appeals to the Court of Appeals for the Ninth Circuit from the Order Granting Motion to Dismiss entered in this action on December 26, 1956.

Dated at Fairbanks, Alaska, this 16th day of January, 1957.

/s/ ROBERT A. PARRISH,
Attorney for Plaintiff-
Appellant.

Receipt of copy acknowledged.

[Endorsed]: Filed January 23, 1957.

[Title of District Court and Cause.]

BOND ON APPEAL

Whereas, the plaintiff in the above-entitled action, Richard E. Bennett, has this day filed with the District Court for the District of Alaska, Fourth Division, his notice of appeal from the Order Granting Motion to Dismiss entered on December 26, 1956, in favor of the Defendant,

Now, therefore, in consideration of the premises and of such appeal, we Richard E. Bennett, as principal, and Martha Hoeckle and William R. Whitcher, as sureties, do hereby undertake and promise and do acknowledge ourselves bound unto the defendants in the sum of Two Hundred Fifty and No/100ths Dollars (\$250.00), conditioned for the payment of the costs on appeal, if the appeal is dismissed or the said order affirmed, or of such costs as the appellate Court may award if the judgment is modified.

Dated this 24th day of January, 1957.

/s/ RICHARD E. BENNETT,
Plaintiff, Principal.

/s/ MARTHA HOECKLE,

/s/ WM. R. WHITCHER,
Sureties.

United States of America,
Territory of Alaska—ss.

William R. Whitcher, of 1015 Eighth Avenue, Fairbanks, Alaska, and Martha Hoeckle, of 202 Second Avenue, Fairbanks, Alaska, each being duly sworn, upon oath state the following:

I am a resident of the Territory of Alaska, and my address is as stated immediately above. This affidavit is made for the purpose of justifying as Surety on the foregoing Bond on Appeal, the obligation thereunder being in the amount of Two Hundred Fifty and no/100 (\$250.00) Dollars. I am worth in excess of said sum above all exemptions allowed by law. I am aware that in the event of the breach of the conditions of said Bond on the part of plaintiff, I will be required to pay to the United States of America the penal sum thereof.

I am not a Counselor or Attorney at Law, Marshal, Deputy Marshal, Commissioner, Judge, Clerk of Court or other person prohibited by law from acting as such surety.

/s/ WM. R. WHITCHER,

/s/ MARTHA HOECKLE.

Subscribed and sworn to before me this 24th day of January, 1957.

[Seal]: /s/ ROBERT A. PARRISH,
Notary Public in and for the Territory of Alaska.
My Commission expires February 9, 1960.

Receipt of copy acknowledged. /

[Endorsed]: Filed January 24, 1957.

In the District Court for the District
of Alaska, Fourth Division

No. 9254

RICHARD E. BENNETT,

Plaintiff,

vs.

ARCTIC INSULATION, INC., and DELBERT
E. BOYER,

Defendants.

FINAL ORDER OF DISMISSAL
AND JUDGMENT

This matter coming on for hearing upon motion of the defendant Arctic Insulation, Inc., to dismiss the above-entitled action and upon said defendant's motion for costs and attorneys' fees; and the court having examined the files in the above cause and proceedings therein, and the briefs filed in said cause, and having heard statements of counsel and being otherwise fully advised in the premises; and it appearing and the court finding that it granted said defendant's motion to dismiss by its order entered December 26, 1956;

It is now, therefore, Ordered, Adjudged and Decreed as follows:

1. That the defendant, Arctic Insulation, Inc.'s, motion to dismiss the complaint filed herein and this action be and it is hereby granted, and said

complaint and this action be and they are hereby dismissed.

2. That said defendant's motion for costs and attorneys' fees be and it is hereby granted, and reasonable attorneys' fees incurred by said defendant be and they are hereby assessed in the sum of \$300.00, and allowed to said defendant as costs, and the clerk is hereby directed to enter as additional costs in favor of said defendant any costs incurred by it, as may be disclosed by any cost bill duly filed by said defendant, and judgment therefor against Richard E. Bennett, the plaintiff herein, be and it is hereby entered.

3. That pursuant to stipulation of the parties to this action made in open court, the above and foregoing order and judgment be and it is hereby entered nunc pro tunc December 26, 1956.

4. That pursuant to stipulation of parties made in open court, the clerk of this court be and he is hereby directed to include a copy of this order and judgment in the record on appeal being prepared in this cause in lieu of the order granting motion to dismiss entered herein on December 26, 1956.

Done and entered this 8th day of February, 1957.

/s/ VERNON D. FORBES,
District Judge.

Receipt of Copy acknowledged.

Lodged January 31, 1957.

[Endorsed]: Filed and entered February 8, 1957.

[Title of District Court and Cause.]

STATEMENT OF POINTS ON APPEAL

Comes Now, Richard E. Bennett, plaintiff, by and through his attorney, Robert A. Parrish, and itemizes his statement of points on appeal as follows:

That the Court erred by its order of December 26, 1956, in granting the motion to dismiss of the above-named defendants.

Dated at Fairbanks, Alaska, this 12th day of February, 1957.

/s/ ROBERT A. PARRISH,
Attorney for Plaintiff.

Receipt of Copy acknowledged.

[Endorsed]: Filed February 12, 1957.

[Title of District Court and Cause.]

CERTIFICATE OF CLERK

I, John B. Hall, Clerk of the above-entitled Court do hereby certify that the following list comprises all of the proceedings in this cause listed on the Designation of Record on appeal of the plaintiff and appellant, viz.:

- 1—Plaintiff's Complaint.
- 2—Motion to Dismiss.
- 3—Order granting Motion to Dismiss.
- 4—Plaintiff's Notice of Appeal.

5—Bond on Appeal.

6—Final Order of Dismissal and Judgment.

7—Statement of Points on Appeal.

8—Designation of Contents of Record on Appeal.

Witness my hand and the seal of the above-entitled Court this 28th day of February, 1957.

[Seal] /s/ JOHN B. HALL,
Clerk of Court.

[Endorsed]: No. 15464. United States Court of Appeals for the Ninth Circuit. Richard E. Bennett, Appellant, vs. Arctic Insulation, Inc., and Delbert E. Boyer, Appellees. Transcript of Record. Appeal From the District Court for the District of Alaska, Fourth Judicial Division.

Filed: March 6, 1957.

/s/ PAUL P. O'BRIEN,
Clerk of the United States Court of Appeals for the
Ninth Circuit.